
OLR Bill Analysis

sHB 5514 (as amended by House "A")*

AN ACT CONCERNING AN OPTIONAL METHOD OF FORECLOSURE.

SUMMARY:

By law, in a foreclosure proceeding involving real property, the court may issue a judgment of (1) foreclosure by sale or (2) strict foreclosure. This bill adds another option for certain residential properties, called "foreclosure by market sale," which is a court-approved sale on the open market upon the mortgagee's (lender's) request and with the mortgagor's (borrower's) consent. The bill limits this option to the first mortgage on a one-to-four family residential property that is the mortgagor's principal residence.

The bill establishes industry procedures for the foreclosure by market sale option, including requirements for the foreclosure notice, property appraisal, listing agreement, and purchase and sale contract. On and after October 1, 2014, a mortgagee's foreclosure notice must advise the mortgagor of the market sale option. The bill allows a mortgagee, by filing an affidavit with the court, to proceed with other foreclosure options if certain foreclosure by market sale conditions are not met.

The bill also establishes court procedures for the foreclosure by market sale option, including a process that allows subordinate lienholders to preserve their interests in the property. It requires the court to appoint someone to execute the conveyance of the sold property and exempts such a transfer from real estate conveyance tax.

The bill specifies that it should not be construed as requiring either the mortgagor or the mortgagee to (1) proceed with discussions after the foreclosure by market sale notice has been sent, (2) reach an agreement regarding a listing agent, or (3) approve any purchase offers

received.

Lastly, the bill bars a mortgagor who consents to foreclosure by market sale from participating in the state's foreclosure mediation program, but allows him or her to petition the court to participate under certain circumstances.

*House Amendment "A" replaces the underlying bill with similar provisions. It also:

1. requires the court to appoint a person to make the sale and bring the proceeds to court;
2. broadens the issues to be determined at the hearing;
3. establishes a process for subordinate lienholders to preserve their interests in the property;
4. exempts, from the real estate conveyance tax, transfers made pursuant to foreclosure by market sale;
5. removes the requirement for a mortgagee to file an affidavit at the time the complaint is filed; and
6. makes minor, technical, and conforming changes.

EFFECTIVE DATE: October 1, 2014

§ 3 — FORECLOSURE NOTICE AND MORTGAGEE AFFIDAVIT

Foreclosure Notice

By law, before beginning a mortgage foreclosure, a mortgagee must send notice by registered or certified mail with postage prepaid to the mortgagor at the address of the residential property secured by the mortgage.

Under the bill, beginning October 1, 2014, such a notice must inform the mortgagor of the (1) mortgage delinquency or default, (2) option to contact the mortgagee to discuss selling the property through foreclosure by market sale, and (3) mortgagee's contact information

(i.e., mailing address, telephone and fax number, and email address). It must state that the mortgagor has at least 60 days from the notice date to contact the mortgagee and elect, in writing, the market sale option.

The notice must also inform the mortgagor that:

1. he or she should contact a licensed real estate agent to discuss the feasibility of listing the property for sale through the foreclosure by market sale process;
2. before he or she can discuss a listing agreement with the mortgagee, he or she must allow a property appraisal in order to verify eligibility for the foreclosure by market sale option;
3. the appraisal will require both an interior and exterior property inspection;
4. the mortgagor and mortgagee must agree to the terms and conditions of the (a) listing agreement, including the duration and listing price and (b) any purchase offer, including the purchase price and any contingencies; and
5. if an acceptable offer is received, the mortgagor will sign an agreement to sell the property through a foreclosure by market sale.

Additionally, the notice must inform the mortgagor, that he or she will not be eligible for the state's foreclosure mediation program in any foreclosure action that begins after giving consent to foreclosure by market sale. (The bill does not require the notice to include disclosure of the exception that allows a mortgagor to petition the court for inclusion in the mediation program under certain circumstances.)

The mortgagee may combine this notice with any other notice that is required under the Connecticut Housing Authority Act or federal law.

Mortgagee Affidavit

Under the bill, the mortgagee may continue the foreclosure of the mortgage without the restrictions or further requirements of the

foreclosure by market sale option, if it files an affidavit with the court indicating that the notice described above was provided and (1) the mortgagor failed to elect foreclosure by market sale by the required date or (2) discussions were initiated but the mortgagee and the mortgagor were unable to proceed with the market sale option.

The bill specifies the following reasons why a mortgagee and mortgagor may be unable to proceed with a foreclosure by market sale:

1. the mortgagee and mortgagor were unable to reach a mutually acceptable agreement to proceed;
2. the mortgage does not appear to be eligible for foreclosure by market sale, based on the appraisal of the property (the bill does not specify how eligibility is determined);
3. the mortgagor did not grant reasonable interior access for the appraisal;
4. the mortgagee and mortgagor (a) were unable to reach a mutually acceptable listing agreement or (b) executed a listing agreement but received no purchase offers;
5. an offer or offers were received, but were unacceptable to either the mortgagee, mortgagor, or both; or
6. other circumstances exist that would (a) allow the mortgagee or mortgagor to decide not to proceed or (b) otherwise make the mortgage ineligible for foreclosure by market sale.

The mortgagee may combine this affidavit with any other affidavit that is required under the Connecticut Housing Authority Act or federal law.

§§ 4-6 — PROPERTY APPRAISAL AND LISTING AGREEMENT

Appraisal

Under the bill, if the mortgagee and mortgagor agree to pursue foreclosure by market sale, the (1) mortgagee must have a licensed

appraiser conduct a written appraisal of the property's fair market value and (2) mortgagor must, promptly upon request, allow the appraiser reasonable access to the property only to gather facts necessary for the appraisal.

The bill requires the mortgagee to provide a copy of the appraisal to the mortgagor as soon as practicable after receiving it.

Listing Agreement

If the appraisal indicates that the mortgage would likely be eligible for foreclosure by market sale, the bill allows the mortgagee and mortgagor to agree to list the property for sale with a licensed real estate broker or sales person chosen by the mortgagor using a listing agreement. (The bill does not specify how the mortgage's eligibility for such a foreclosure would be determined.) The bill prohibits the mortgagee from conditioning approval of the listing agreement on the mortgagor's use of a specific listing agent.

The listing agreement the mortgagor executes must (1) be acceptable to both mortgagee and mortgagor and (2) require the listing agent to report any offer to both the mortgagor and the mortgagee as soon as practicable. The mortgagee must give the listing agent a name, mailing address, telephone and fax numbers, and email address to report purchase offers.

Under the bill, once the mortgagor executes the listing agreement, the mortgagee (1) is prohibited from requiring the use of an auction, other alternative methods of sale, or a specific listing agent as a condition of approving an offer and (2) must explain in writing to a mortgagor its decision that an offer is unacceptable, unless the offer is also unacceptable to the mortgagor.

§§ 6 & 7 — CONTRACT, FORECLOSURE COMPLAINT, AND MOTION FOR JUDGMENT

Purchase and Sale Contract

Under the bill, if the mortgagor executes a mutually agreeable listing agreement and receives a mutually agreeable purchase offer, it

must execute a purchase and sale contract. The purchase and sale contract must (1) include the agreed-upon price, terms, and conditions; (2) be contingent on the completion of the foreclosure by market sale; and (3) be mutually agreeable to the mortgagor and mortgagee.

Within five days after executing the purchase and sale contract, the mortgagor must give the mortgagee (1) a copy of the contract and (2) written consent for the mortgagee to file a motion for judgment of foreclosure by market sale. The mortgagee may determine an acceptable form of the written consent.

Complaint, Motion for Judgment, and Judgment

Under the bill, to consummate the sale the mortgagee, unless otherwise prohibited by law, must file a foreclosure complaint within the later of the following time periods:

1. 30 days after receiving the purchase and sale contract and the mortgagor's written consent, or
2. 30 days after the satisfaction or expiration of any contract contingencies that must be satisfied or have expired before the foreclosure action may begin.

The filed or revised complaint must contain a copy of the (1) purchase and sale contract and (2) appraisal.

Ten days after the filed complaint return date, the mortgagee may file a motion for judgment of foreclosure by market sale. Under the bill, after a hearing and notice and with the mortgagor's consent, the court may (1) render a judgment of foreclosure by market sale approving the purchase and sale contract and (2) appoint a person to make the sale. The judgment is final. The issues at the hearing are limited to a (1) finding of the property's fair market value and any priority lien holders and (2) determination of:

1. the sale fees and expenses, including any real estate broker commissions;

2. the person appointed to make the sale;
3. the purchaser's reasonable costs and expenses incurred in connection with the purchase and sale contract;
4. the amount of the mortgagee's debt; and
5. whether the mortgagee's debt plus any priority liens exceeds the property's fair market value.

Under the bill, after the hearing, the court may render a supplemental judgment that specifies the (1) persons who are entitled to proceeds from the market sale and (2) amount to which each person is entitled.

§ 8 — SUBORDINATE LIENHOLDERS

Under the bill, within 30 days after the court renders a judgment of foreclosure by market sale, it must schedule right-of-first-refusal law days in inverse order of priority. This allows subordinate lienholders to pay the agreed-upon price in the purchase and sale contract to the person appointed to make the sale to preserve their equity interest in the property.

A subordinate lienholder's interest terminates after the designated right-of-first-refusal law date passes if on that date the lienholder took no action. If a subordinate lienholder purchases the property on the designated law day, the purchaser specified in the market sale contract must be reimbursed from the sale proceeds for any costs and expenses associated with the contract as determined by the court.

§§ 9-11 — SALE AND CONVEYANCE OF TITLE

Under the bill, in a foreclosure by market sale, the person appointed to make the sale must (1) execute the conveyance of the sold property and (2) bring the proceeds of the market sale into court. The conveyance is valid against all parties and their privies (i.e., persons having legal interest in the property).

The court, either at the time of or after the sale, may (1) order

possession of the property to be given to the purchaser and (2) issue an execution of ejectment after the time for appeal of the foreclosure judgment has expired.

In a foreclosure by sale, if the property sells for less than the appraised value, the court cannot enter a deficiency judgment until one-half of the difference between the appraised value and the selling price is credited against the debt. This same condition does not apply under the bill to foreclosures by market sale.

§§ 7 & 12 — FORECLOSURE MEDIATION, FORECLOSURE BY SALE, AND STRICT FORECLOSURE

Under the bill, a mortgagor who consents to a foreclosure by market sale is ineligible for the foreclosure mediation program unless the court denies the mortgagee's motion for judgment of foreclosure by market sale or it becomes likely that a sale will not be completed according to the judgment. In such circumstances, the (1) mortgagee has the right to request the other foreclosure options available under law, "foreclosure by sale" or "strict foreclosure" (see BACKGROUND) and (2) mortgagor may file a petition with the court to be included in the mediation program, if he or she did not substantially contribute to the denial or circumstances that resulted in the incomplete sale.

The court must consider any testimony or affidavits the parties submit in support of, or in opposition to, the mortgagor's petition for inclusion in the foreclosure mediation program. In order to grant the petition, the court must find that (1) it is not an attempt to delay the foreclosure and (2) it is likely the parties will reach an agreement through mediation.

§ 13 — REAL ESTATE CONVEYANCE TAX EXEMPTION

The bill exempts transfers made pursuant to a foreclosure by market sale from the real estate conveyance tax.

Under existing law, among the deeds that are exempt from the real estate conveyance tax are (1) transfers made pursuant to a foreclosure by sale and (2) transfers of a seller's principal residence when the transfer is (a) in lieu of a foreclosure or (b) a "short sale" (i.e., the sale

of a real estate property for less than the balance remaining on the mortgage).

By law, the conveyance of real estate for \$2,000 or more is subject to a tax, of which part goes to the state and the other part goes to the municipality where the tax is paid. The applicable state and municipal rates are combined to get the total tax rate for a particular transaction. The combined rate is applied to the sale price. Under existing law, the state's portion of the tax is 0.75% of (1) the first \$800,000 of the sale price of a residential property and (2) the full sale price of unimproved land and certain bank foreclosures for mortgage delinquencies. A 1.25% rate applies to any portion of the sale price of a residential dwelling that exceeds \$800,000 (CGS § 12-494).

BACKGROUND

Foreclosure by Sale

With a judgment of sale, the court (1) establishes the time and manner of the sale, (2) appoints a committee to sell the property, and (3) appoints three appraisers to determine its value. The borrower may stop the foreclosure proceedings at any time before the sale by paying the balance due on the mortgage. If no such payment is made, the committee must go forward with the sale. The lender may sue to obtain a deficiency judgment (an order for the borrower to repay any remaining mortgage balance).

Strict Foreclosure

With strict foreclosure, no actual foreclosure sale is held. Instead, the lender goes to court to try and obtain a court order demonstrating the borrower is in default of the mortgage. If successful, the title transfers to the lender immediately. However, the court sets an amount of time in which the borrower may redeem the property, but if he or she fails to do so, the title becomes absolute to the lender and the borrower no longer has any claim to the property. The lender then has 30 days to record a certificate of foreclosure, which must contain a description of the property, the foreclosure proceedings, and the mortgage along with the date the title became absolute.

Foreclosure Mediation Program

The state's foreclosure mediation program determines whether parties can reach an agreement that will avoid foreclosure. The program uses the Judicial Branch's foreclosure mediators to conduct mediation sessions in a statutorily prescribed timeframe. Under existing law, the program will sunset on July 1, 2014.

Related Bills

sHB 5353 (File 363, as amended by House "A"), favorably reported by the Banks Committee, extends the foreclosure mediation program by two years, until July 1, 2016.

HB 5483 (File 99), favorably reported by the Housing Committee, extends the foreclosure mediation program by four years, until July 1, 2018. It also adds the Housing Committee to the required recipients of two reports of the Judicial Branch's chief court administrator.

COMMITTEE ACTION

Banks Committee

Joint Favorable Substitute

Yea 17 Nay 0 (03/18/2014)

Judiciary Committee

Joint Favorable

Yea 28 Nay 2 (04/17/2014)